LOKE HONG KEE (S) PTE. LIMITED v. UNITED OVERSEAS LAND LIMITED

[P.C. (Lord Diplock, Lord Elwyn-Jones, Lord Keith of Kinkel, Lord Lowry & Lord Brandon of Oakbrook), February 9, 10 and March 31, 1982]

[Privy Council Appeal No. 21 of 1980]

Arbitration – Case Stated – Dispute arising out of written agreement – Supplemental agreement containing provision for termination on recommendation of architect – Contract terminated in accordance therewith – Whether arbitrator can review or revise opinion of architect.

In this case the parties had entered into a written agreement under which the appellant agreed to carry out and complete building works under the supervision and to the satisfaction of the respondents' architect. Problems arose in the course of the works and a supplemental agreement was made which provided *inter alia* that the respondents were "at liberty to determine the employment of the appellants under the main contract forthwith by notice in writing" upon the recommendation of the architects in writing should he be of the opinion that the appellant had failed to maintain the progress of works as specified in the schedule to the agreement. The architect, pursuant to the said provisions by a letter to the appellants recommended the determination of employment of the appellants under the main contract. The appellants were not in his opinion carrying out the works expeditiously and with every diligence. The respondents thereupon determined the appellant's employment under the main contract. Disputes having arisen between the parties the matter was referred to arbitration before a single arbitrator. Subsequently the parties agreed that the arbitrator should state certain points of law for the opinion of the High Court. These included the following –

"A.1 Whether I am entitled to open up review or revise an opinion of the Architect under Article V Clause 3 of the Supplemental Agreement pursuant to the powers conferred upon me by Clause 34 of the Main Contract.

A.2 Whether for the purposes of Article V Clause 3 of the Supplemental Agreement and the recommendation of the Architect given pursuant thereto it is sufficient that the Architect should have formed an opinion in good faith on the information available to him at the time.

A.3 Whether or not by virtue of the powers conferred upon me as Arbitrator under Clause 34 of the Main Contract, I am entitled to direct that Claimants' claims under paragraphs 4 and 4A of their Points of Claim be measured and/or valued as may in my opinion be desirable in order to determine the rights of the parties and/or open up, review or revise the valuation of works executed and materials supplied by the Claimants and carried out by Pakatan purportedly pursuant to the provisions of Article V Clause 6 of the Supplemental Agreement."

The learned judge in the High Court answered the first and third of the questions in the affirmative and treated the second as superseded. He held that the arbitrator could review or revise the opinion of the architect under the supplemental agreement pursuant to the powers conferred upon him by the main contract – See [1979] 1 M.L.J. 108.

On appeal the Court of Appeal reversed the judgment of the High Court, and answered the first and third questions in the negative and the second in the affirmative. The Court of Appeal held (1) on a careful consideration of the supplemental agreement, the intention of the parties to it was that the respondent's could determine the appellant's employment under the main contract if *inter alia* the architect was of the *bona fide* opinion that the progress of the works specified in the Schedule to the supplemental agreement was unsatisfactory and the architect recommended in writing to the appellants to determine the employment, (2) however stringent such a term may be, when it comes to be enforced, the courts have declared that their duty is in such cases to ascertain and give effect to the intention of the parties as evidenced by the agreement and if a term is clear and unambiguous the court is bound to give effect to it without stopping to consider how far it may be oppressive or not, (3) the powers of the arbitrator under Clause 34(3) are limited to opening up, reviewing or revising the opinion or decision of the architect and the arbitrator is given no power under that clause to open up a valuation by a third party as a result of a separate contract between the parties in which they have expressly agreed that the valuation should be final and binding on them. See [1981] 1 M.L.J. 5.

The appellants appealed to the Privy Council.

Held: in this case the conclusion must be that the opinion of the architect under Article V Clause 3 of the Supplemental Agreement was intended to be a special kind of opinion, different from the various opinions of his mentioned in the main contract and that the general powers of the arbitrator contained in Clause 34(3) were not intended to apply to it. It follows that the function of the arbitrator is limited to deciding whether as a matter of fact the opinion was given and was *bona fide* and that the Court of Appeal rightly answered Question A1 in the negative and A2 in the affirmative; (2) as agreed by the parties, Question A3 was rightly answered in the negative.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Desmond Wright (*C.S. Wu* with him) for the appellant.

Lord Bledisloe (*M. Brindle* with him) for the respondents.

Cur. Adv. Vult.

Lord Keith of Kinkel (delivering the Judgment of the Board): This appeal comes before the Board from a judgment dated July 25, 1979 of the Court of Appeal in Singapore. By that judgment the court (Wee Chong Jin C.J., Kulasekaram and F.A. Chua JJ.) reversed a judgment of D'Cotta J. and answered in favour of the respondents certain questions contained in a consultative Case Stated by the Arbitrator in the course of arbitration proceedings in which the appellants are claimants and the respondents are respondents.

The arbitration arises out of contractual arrangements between the parties concerned with the construction by the appellants, as contractor, for the respondents, as employer, of two blocks of flats at Cairnhill Plaza, Singapore. There are two contractual documents to be considered. The first of these ("the Main Contract") was dated March 8, 1974. It was in the then current standard form of Singapore Institute of Architects, and it provided *inter alia* that the construction of the flats should be completed by March 16, 1976. The works were to be under the supervision of an architect, Mr. William Chen, and were to be carried out and completed to his reasonable satisfaction.

Problems arose in the course of the works, and on March 23, 1976 the parties entered into a Supplemental Agreement. This proceeded upon a narrative setting out *inter alia* that the contractor was not expected to be able to meet the extended completion date of May 4, 1976 fixed by the architect, that the contractor had certain claims against the employer, that the contractor had failed to pay to various nominated sub-contractors substantial sums that were due to them, and that the contractor was in debt for almost $2m. in respect of materials supplied to him. The Supplement Agreement went on to provide for such matters as financial assistance by the employer to the contractor, and for payments to be made direct by the employer to subcontractors and to suppliers of materials, such payments

being deductible from contract payments from time to time due to the contractor.

Article V, under the heading "Progress of Works" provided *inter alia* as follows:—

"1. The Contractor shall adhere to the progress of Works specified in the Third Schedule hereto to ensure that completion of the Works shall take place on or before the following:
(a) in respect of Block 1 – 30th April 1977
(b) in respect of Block 2 – 30th October 1977
2. The Contractor shall carry out the Works expeditiously and with every diligence and complete the same.
3. In the event of the progress of the said Works being in the opinion of the Architect unsatisfactory and/or in the event of the Contractor failing to adhere or maintain the progress of Works as specified in the said Third Schedule and/or upon any breach of this Agreement by the Contractor then upon the recommendation of the Architect in writing and in addition to the Employer's rights under the principal Agreement the Employer shall be at liberty to determine the employment of the Contractor thereunder forthwith by notice in writing.

.....

5. Upon the said determination or upon any determination of the employment of the Contractor under the Principal Agreement the Contractor shall forthwith remove all works from site and shall forthwith surrender the site to the Employer and not retain possession thereof and not do any thing or carry any act of whatever kind to prevent the Employer from taking possession of the site or from carrying out any works therein.
6. Upon the Employers regaining posession of the site the firm of Pakatan International Suckling McDonald of 37B Tanglin Road, Singapore 10 Tel: 648211/2358211 shall within 2 weeks from the date thereof measure the Works as completed by the Contractor and the valuation of the said quantity surveyor shall be binding on both parties and shall be final. The costs and fees of the said quantity surveyor shall be borne by the parties hereto equally."

Article VIII (1) provided:—

"1. Notwithstanding the provisions contained in this Agreement the time for completion of the Works unless extended by the Architect under the Principal Agreement shall remain as the 4th day of May 1976 and nothing herein shall effect or modify or diminish any right of the Employer and the Contractor of whatever kind against each other arising out of or any act or default of either party under the Principal Agreement the terms and conditions of which shall remain valid and binding on the parties hereto subject to the provisions of this Agreement particularly the additional rights and benefits of the Employer provided in this Agreement."

On March 1, 1977 the architect sent to the respondents, with copy to the appellants, a letter containing the following passage:—

"I am of the opinion that progress of the works is unsatisfactory and from my letters to Loke Hong Kee (S) Pte. Ltd. it is obvious that
(a) The contractor has failed to adhere or maintain the progress of works as specified in the Third Schedule of the Supplemental Agreement dated the 23rd day of March, 1976 between you and the contractor.
(b) The contractor is not making any serious attempt to adhere or maintain the progress of works as specified in the said Third Schedule.
(c) The contractor is not carrying out the works expeditiously and with every diligence.
I hereby give the recommendation specified in Clause 3 Article V of the said Supplemental Agreement. You may now determine the employment of the contractor under the Principal Agreement forthwith by notice in writing should you so desire."

On the same date the respondents sent to the appellants a letter purporting to terminate forthwith their employment under the Main Contract. The appellants disputed the lawfulness of the termination. This dispute, with others, was referred to a sole arbitrator under Clause 34 of the Main Contract, which was in these terms:—

"(1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 31 or 32 of these Conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Singapore Institute of Architects.

.....

(3) Subject to the provisions of clauses 2(2) and 30(7) of these conditions the Arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.
(4) The award of such Arbitrator shall be final and binding on the parties."

At an early stage of the arbitration proceedings the arbitrator was requested by the parties to state for the decision of the High Court, under section 28 of the Arbitration Act (c. 16), a case raising a number of points of law. The case as stated set out various questions of law, of which three only remain relevant to be answered at this stage. They are:—

"A.1 Whether I am entitled to open up review or revise an opinion of the Architect under Article V Clause 3 of the Supplemental Agreement pursuant to the powers conferred upon me by Clause 34 of the Main Contract.
A.2 Whether for the purposes of Article V Clause 3 of the Supplemental Agreement and the recommendation of the Architect given pursuant thereto it is sufficient that the Architect should have formed an opinion in good faith on the information available to him at the time.
A.3 Whether or not by virtue of the powers conferred upon me as Arbitrator under Clause 34 of the Main Contract, I am entitled to direct that Claimants' claims under paragraphs 4 and 4A of their Points of Claim be measured and/or valued as may in my opinion be desirable in order to determine the rights of the parties and/or open up, review or revise the valuation of works executed and materials supplied by the Claimants and carried out by Pakatan purportedly pursuant to the provisions of Article V Clause 6 of the Supplemental Agreement."

D'Cotta J. answered the first and third of these questions in the affirmative and treated the second as superseded. The Court of Appeal, reversing his judgment, answered the first and third questions in the negative and the second in the affirmative.

The main issue in the appeal is concerned with the correct answer to Question A.1. It is not in dispute that the Arbitration clause in the Main Contract, Clause 34, applies to differences between the parties arising out of the terms

of the Supplemental Agreement. The argument revolves round the question whether the opinion of the architect that the progress of the works is unsatisfactory, given under Article V(3) of the Supplemental Agreement, is final, or whether it is liable to be opened up and reviewed by the arbitrator under the provisions of Clause 34. Counsel for the appellants relied strongly on the terms of Clause 34(3), particularly the provision that the arbitrator should have power "to open up, review and revise any ... opinion ... in the same manner as if no such ... opinion ... had been given". He drew attention to a number of contexts in the Main Contract containing reference to opinions being given by the architect upon a variety of matters, which opinions were plainly intended to be capable of review by the arbitrator under Clause 34(3), and submitted that a similar intention was to be inferred as regards an opinion given under Article V(3). Support for this submission was sought to be derived from the circumstances that Article V(3) did not say that the architect's opinion was to be final, whereas this was expressly stated as regards the valuation by quantity surveyors provided for by Article V(6). Where the parties intended a particular decision to be final they made express provision to that effect and, this not having been done in Article V(3), the proper inference was that an opinion given thereunder was not intended to be excluded from review.

These are powerful arguments, but their Lordships are of opinion that the Court of Appeal was right to conclude that they should not prevail. The question is one of construction of Article V(3) of the Supplemental Agreement, to be resolved by ascertainment of the intention of the parties from the language they have used, having regard to the context and to relevant surrounding circumstances. These circumstances include the serious difficulties into which the contractor had fallen, as enumerated in the preamble to the agreement. In that situation it would not be surprising that the employer might seek, and the contractor might agree to, some unusually drastic and summary sanction capable of being invoked if the progress of the works was not improved. The phrase "in the opinion of the architect unsatisfactory" which appears in Article V(3) carries the kind of subjective connotation which is necessarily associated with words expressive of satisfaction or dissatisfaction. It is the view of the particular architect as to what is or is not satisfactory which is to be the criterion, not any objective standard. It was argued for the respondents that significance was to be attached to the consideration that, if the contract were to be terminated following a recommendation by the architect made after formation by him of the requisite opinion, matters would be irretrievable, in respect that the contractor would have been removed from the site and it would be impracticable to set the contract on foot again. It was said to be unlikely in such a situation that the parties would have intended that the architect's opinion should be capable of being opened up with the possibility of it being decided *ex post facto* that the contract had not been lawfully terminated. By contrast, in the other contexts of the Main Contract where the architect's opinion might lead to certain results affecting the parties' rights, there was an opportunity of review by arbitration before matters had gone too far to be capable of being put right. There is some force in this argument, but the edge is somewhat taken off it when it is observed that in the case of the other two limbs of Article V(3) – failure to maintain the progress of works as specified in the Third Schedule, and any breach by the contractor of the Supplemental Agreement – it would turn on the ascertainment of objective facts whether or not the employer was entitled to terminate on the architect's recommendation. This necessarily opens up, in relation to these two limbs, the possibility of an *ex post facto* decision that the employer was not entitled to terminate, which makes it hard to say that such a possibility is unlikely to have been in contemplation as regards the first limb. At the same time, it is a reasonable view that the contexts of the Main Contract bearing reference to the architect's opinion are all concerned with matters relating to foreseeable incidents likely to arise in the ordinary course of the contract, with which the drastic occurrence of complete termination is to be contrasted.

Then it is to be noted that the provisions of Article V(3) are thereby stated to be "in addition to the Employer's rights under" the Main Contract, and that by Article VIII(1) it is provided that the terms and conditions of the latter "shall remain valid and binding on the parties hereto subject to the provisions of this Agreement, particularly the additional rights and benefits of the Employer provided in this Agreement". Clause 25(1) of the Main Contract gives the employer the right to terminate the contract, in the event of various defaults by the contractor, if the default is not remedied within a certain time after the expiry of 14 days' notice. None of these defaults, one of which (paragraph (b)) is failure to proceed regularly and diligently with the works, is expressed as turning in any way on the opinion of the architect. The introduction into Article V(3) of the reference to the opinion of the architect must, having regard to the surrounding circumstances and to the general context of the Supplemental Agreement, be intended to have some content in the nature of conferring upon the employer some special kind of remedy. The right to terminate merely upon the recommendation of the architect following on the formation by the latter of the requisite opinion is special in respect that it does not turn upon an objective ascertainment of the facts regarding the progress of the works. If it were intended that the right to terminate should depend on establishing objectively that such progress was unsatisfactory, and that if necessary this would have to be done to the satisfaction of the arbitrator, the reference to the opinion of the architect would be quite futile. The architect's opinion would be of no consequence whatsoever, if it were liable to be opened up and reviewed by the arbitrator, as if it had never been given, in the course of the latter deciding for himself whether or not progress had been unsatisfactory. The conclusion must be that this opinion of the architect was intended to be a special kind of opinion, different from the various opinions of his mentioned in the Main Contract, and that the general powers of the arbitrator contained in Clause 34(3) were not intended to apply to it. It follows that the function of the arbitrator is limited to deciding whether as matter of fact the opinion was given and was *bona fide*, and that the Court of Appeal rightly answered Question A.1 in the negative and A.2 in the affirmative.

The parties were agreed that in that situation Question A.3 was rightly answered in the negative.

For these reasons their Lordships dismiss the appeal and remit the case to the Court of Appeal in Singapore for them to deal with those questions in the Case Stated which have not yet been disposed of. The appellants must pay to the respondents the cost of the appeal to this Board.

Appeal dismissed.

PHOENIX HEIGHTS ESTATE (PTE.) LIMITED v. LEE KAY GUAN & ANOR.

[P.C. (Lord Russell of Killowen, Lord Scarman, Lord Roskill, Lord Brightman and Sir Sebag Shaw) May 26, 1982]
[Privy Council Appeal No. 15 of 1979]

Land Law – Contract to purchase a house – Delay in completion – Date of completion stipulated in agreement – Failure to give notice to complete – Claim for liquidated damages from agreed date of completion to date of issue of certificate of title – Purchaser's refusal to occupy house unless title issued – Liquidated damages not a penalty – Local Government (Building) Regulations, 1966, reg. 34(1) – Housing Developers Rules, 1965, r. 9A – Planning Act (Cap. 279), s. 9.

Contract – Purchase of house – Breach of contract – Date of completion stipulated in agreement – Delay in completion – Claim for liquidated damages.

Housing Developers – Developer's failure to give notice to complete – Purchaser's refusal to occupy house unless title issued – Damages – Liquidated damages – Local Government (Building) Regulations, 1966, reg. 34(1) – Housing Developers Rules, 1965, reg. 9A – Planning Act (Cap. 279), s. 9.

The respondents in this case entered into a contract to purchase a house. The contract provided that it should be completed before June 30, 1973. The contract also provided that if the appellants failed to complete they would pay the respondents liquidated damages from the appointed date to the date when notice to complete was actually given. The house was finally completed in November 1974. On November 28, 1974 the building authority issued a Temporary Occupation Licence for the house to be occupied by the purchasers/respondents. The respondents refused to occupy the house until April 17, 1975. They claimed liquidated damages. The appellants admitted liability for damages up to the date of issuance of the T.O.L. The issue in the High Court was whether they were liable to liquidated damages for the period November 28, 1974 to December 8, 1975 when the appellants gave to the respondents the requisite notice to complete. The High Court dismissed the claim ([1976] 2 M.L.J. 47) but on appeal the Court of Appeal allowed the claim ([1979] 1 M.L.J. 156). The appellant appealed. It was argued on the appeal (a) that on the true construction of the sale agreement the provision for the payment of liquidated damages in the event of delay in serving notice to complete only applied so long as there was delay, not merely in serving that notice, but also in offering vacant possession, so that it was argued liquidated damages ceased to accrue at the rate of 9% per annum on the purchase price after the offer of vacant possession had been made although the notice to complete was still outstanding, (b) that if on the true construction of the agreement the liability to pay at the rate of 9% on the purchase price continued to accrue notwithstanding that possession was offered, such compensation was not a genuine pre-estimate of the damage likely to be caused by delay in completion, but was penal in nature and void, (c) on the true construction of the sale agreement the assumption by the purchasers of possession caused liquidated damages to cease to accrue on the date the respondents went into possession.

Held: (1) the wording of Clause 11 in the sale agreement is plain. Damages are to be "calculated from day to day in respect of the period commencing from the appointed day up to the date when the said notice to complete shall have actually been given". Nothing could be clearer and the vendor could not curtail the right of the purchasers to liquidated damages by making an offer of possession which the purchasers were not bound to accept;

(2) the sale agreement in this case followed the statutory form. In any event the agreement for liquidated damages was not directed to different categories of breach of contract but to a single sort of breach, namely a delay in serving notice to complete. The offer in the present case of vacant possession before completion was never a part of the sale agreement, but was an event altogether outside the contract. It cannot therefore be taken into account in assessing the validity of the agreement for compensation for delay in serving a notice to complete;

(3) the sale agreement did not contain either expressly or by necessary implication any term that the liquidated damages would cease to accrue once the purchaser entered into possession and in any case the argument was not advanced in the courts below.

Cases referred to:–

(1) *Rowe* v. *School Board for London* (1887) 36 Ch.D. 619.

(2) *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* [1915] A.C. 79, 87.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Desmond Wright Q.C. (*Howard Cashin* with him) for the appellant.

Stewart N. Mckinnon Q.C. (*Stephen Auld* with him) for the respondents.

Cur. Adv. Vult

Lord Brightman (delivering the judgment of the Board): This appeal from the Court of Appeal of Singapore raises a short point on a contract for the sale of land: whether a provision in the contract for the payment of liquidated damages in the event of the vendor's delay in completion is valid, and if so, to what extent it applied on the facts of the instant case.

In or about 1971 the appellant ("the vendor") started to develop a building estate in Singapore known as the Phoenix Heights Estate. Phase 2 of the development consisted of the erection of some 100 buildings for use as houses, flats and shops.

Such a development is governed by certain ordinances and regulations, to some of which it is necessary to refer. Under section 9(1) of the Planning Act, the development of land requires the permission of the competent authority. Under subsection (3) of that section the "subdivision" of land requires a similar permission. "Subdivision has a defined meaning in the Act, but for present purposes, it is sufficient to say that this sale, being a part disposal of the vendor's estate, involved a subdivision.

The Local Government (Building) Regulations, 1966 deal with fitness for occupation. Under regulation 34(1) a certificate of fitness for occupation of a building is to be given when (shortly stated), the Chief Building Surveyor or his authorised officer has inspected the building and is satisfied that it conforms with the approved plans. Under sub-rule (3) it is unlawful for a person to occupy a building, or to permit it to be occupied, unless a certificate of fitness for occupation has been issued. There is, however, a proviso "that the Chief Building Surveyor may in his discretion grant a licence for the temporary occupation of such building for a period not exceeding six months, in